

IN THE COURT OF APPEALS OF TENNESSEE  
EASTERN SECTION

**FILED**  
**November 25, 1997**  
**Cecil Crowson, Jr.**  
Appellate Court Clerk

PATRICIA SUE BAKER ( SANDERS ) ) BLOUNT COUNTY  
 ) 03A01-9704-GS-00115  
Plaintiff - Appellee )  
 )  
v. ) HON. WILLIAM R. BREWER, JR.,  
 ) JUDGE  
 )  
PAUL DAVID BAKER )  
 )  
Defendant - Appellant ) AFFIRMED AND REMANDED

ROBERT M COHEN OF MARYVILLE FOR APPELLANT

KEVIN W SHEPHERD OF MARYVILLE FOR APPELLEE

O P I N I O N

Goddard, P.J.

Paul David Baker appeals a Blount County General Sessions Court's post-divorce visitation modification order granted in favor of Patricia Sue Baker Sanders (hereinafter referred to as Ms. Baker).

We will first restate the four issues--two of which can be consolidated--that Mr. Baker presents on appeal. The first consolidated issue is whether the Trial Court's order was an

abuse of discretion and whether the order violated Mr. Baker's right to free exercise of religion under the Constitutions of the United States and of Tennessee. The second issue presented is whether the portion of the Trial Court's order prohibiting Mr. Baker from exposing his children to the teachings and beliefs of the Jehovah's Witness religion during his visitation periods, unless the children make legitimate inquiries about the religion, violates the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb. The third and final issue presented is whether the portion of the Trial Court's order prohibiting Mr. Baker from taking his children to any religious services or home Bible studies conducted by the Jehovah's Witnesses constitutes error, an abuse of discretion, and a violation of the children's First Amendment rights. For the reasons set forth below, we affirm the General Sessions Court's order.

The parties were married on April 8, 1980. Three minor children were born to their union: Dustin Paul (d.o.b. 8/25/81), Amanda Kate (d.o.b. 8/8/82), and Lindsey Louise (d.o.b. 7/14/87). Mr. Baker divorced Mrs. Baker on July 3, 1991, in Blount County and was awarded custody of the three minor children. Mr. Baker received visitation rights that included, but were not limited to, alternating weekends from Friday after school until 8:00 a.m. Sunday, and Thursday evenings of the same week from after school until 8:00 p.m. Visitation rights for holidays and birthdays were equally divided between the parents.

Mr. Baker and the minor children attended services at East Maryville Baptist Church prior to and after the divorce. The children were actively involved with many youth-related programs sponsored by East Maryville Baptist Church, including youth rallies and retreats. Beginning in July 1995, Mr. Baker began to study the Jehovah's Witness religion during weekly study meetings with members of the faith. In September or October of 1995, Mr. Baker initially introduced the minor children to the Jehovah's Witness religion by scheduling his weekly studies during his visitation time with the children. Mr. Baker regularly attended religious services with a local congregation of Jehovah's Witnesses beginning in December 1995. The problems giving rise to this appeal commenced after the minor children began participation in the Jehovah's Witness' studies during Mr. Baker's visitation period.

The children's involvement in the weekly studies continued until February 12, 1996, when the General Sessions Court granted a temporary restraining order prohibiting Mr. Baker from discussing the Jehovah's Witness religion with the children. The General Sessions Court based the temporary restraining order upon a finding that the minor children were in danger of immediate and irreparable harm. The Court found that the immediate and irreparable harm resulted from Mr. Baker discussing the Jehovah's Witness religion with the children, criticizing the children's Baptist faith, undermining the religious training the children received from Mr. Baker, and involving the children in

the Jehovah's Witness weekly Bible studies conducted by Charles Tillett, an elder in the church, and other Jehovah's Witness elders.

Mr. Baker filed a petition for visitation on February 20th, 1996, requesting a more specific schedule of visitation. On April 8, 1996, Mr. Baker also filed a motion to set aside the restraining order, claiming that the order violated both his rights and those of the minor children under the Tennessee Constitution and the United States Constitution. However, the Court issued an agreed order on June 13, 1996, requiring the minor children to undergo psychological evaluations conducted by Dr. Carol Walton, a psychologist retained by Mr. Baker. The General Sessions Court conducted a hearing on the pending motions on August 20, 1996. On October 15, 1996, the Court issued the memorandum opinion and order, from which this appeal is taken.

Testimony presented at the hearing on the pending motions primarily involved the fundamental differences between the Baptist and the Jehovah's Witness religions and the effects that the minor children have experienced due to the conflict between the parents. All witnesses attested to the many differences between the two religions. The Trial Court found that extreme fundamental differences exist between the two religions. We agree with the Trial Court's finding. Since the Trial Court's finding of fundamental differences between the religions is sufficient for purposes of this appeal, we need not

delineate each of the specific differences between the two religions.

The other focal point of testimony was the distress that the minor children experienced due to this conflict, which initially began when Mr. Baker began involving the minor children in the Jehovah's Witness weekly study meetings. Ms. Baker voiced her disapproval after learning that Mr. Baker was teaching the children the Jehovah's Witness religion and including them in the weekly meetings. However, Mr. Baker continued teaching the minor children until Ms. Baker obtained the temporary restraining order. At all times leading up to the restraining order, Ms. Baker continued taking the minor children to weekly Baptist church services. Conflict resulted from both parents adamantly stressing their conflicting religions.

Both parents admitted that they made character attacks on the other parent in front of the children after the religious conflict began between the parents. Mr. Baker told the children that their mother had committed activities that could have resulted in her being incarcerated. He also told the children that their mother had engaged in immoral activities with her current husband before they were married. Ms. Baker retaliated by telling the children about Mr. Baker's alcohol and marijuana use.

Ms. Baker testified that when Mr. Baker had the minor children for visitation after becoming a Jehovah's Witness he would not allow the children to participate in any church related activities of the Baptist church. Ms. Baker further testified

that Mr. Baker discouraged the children's participation in some school and community activities because he believed that the children should not participate in these worldly pleasures. Mr. Baker testified that he always took the children to their activities unless he and the children had another preplanned activity.

The children began to show effects from the conflict giving rise to this appeal. Ms. Baker observed that after the children began the Jehovah's Witness weekly studies they became withdrawn and moody. The children's attitudes and personalities changed in a negative manner. Ms. Baker experienced increased difficulties in disciplining the children. Amanda, the middle child, began suffering from significant stomach problems and would become physically sick. The stomach aches would begin right before the children went to Mr. Baker's house for weekend visitation. Ms. Baker also testified that Amanda would usually have stomach aches for a day or two after coming home from Mr. Baker's weekend visitations.

Chris Edmonds, the Associate Pastor of the East Maryville Baptist Church, testified that the children were concerned with being torn between the religious beliefs of their parents. Amanda had come to Mr. Edmonds several times asking him to pray for her about this issue in her life. Mr. Edmonds testified that all of the children's attitudes had changed but that Dustin had undergone the most drastic change, often being confused and depressed. However, Mr. Tillett, an elder in the Jehovah's Witness congregation testified that he observed none of these character changes in the children.

During this controversy, Ms. Baker sent the children to meet with Lisa Davis, a licensed clinical social worker. Ms. Davis' report, introduced into evidence at trial, acknowledged that the children were experiencing genuine conflicts. She stated that the children told her that Mr. Baker and Mr. Tillett attempted to convince them that the Jehovah's Witness religion is the only true way to God. Ms. Davis reported that the children felt they would experience negative repercussions if they tried to express their true feelings to their father. Amanda, the middle child, also told Ms. Davis that she felt coerced into her involvement with the Jehovah's Witness religion.

Finally, Dr. Carol Walton, the psychologist who evaluated the children on behalf of Mr. Baker, provided significant testimony. Dr. Walton testified that the children were experiencing stress because of the conflict between the parents. She testified that the religious differences were not the source of the problem, but the parents' conflict about their religious differences was the source of the children's anxiety. However, Dr. Walton acknowledged during cross-examination that she did not question the children about the Jehovah's Witness religion.

The Trial Court found that there is "no question that the parties' children have been affected by the conflict between their parents." The Court then stated that it refused to assess blame, but ruled in what it thought was in the best interest of the children. The Court applied the test that when there is a conflict between the parents of minor children with regard to

their religious training and influences, the rights of the custodial parent shall prevail. Applying this test, the Court issued the following order:

1. Patricia Sue Baker Sanders has the primary right to determine the religious faith the children are exposed to, influenced by, and educated with.
2. Paul Baker is specifically prohibited from taking the children to any religious services conducted by the Jehovah's Witnesses. This prohibition shall also include any home bible studies conducted by him or any other member of that congregation. However, Paul Baker is not prohibited from discussing his religion with the children, if the children make legitimate inquiries about the same.
3. Paul Baker shall be prohibited from criticizing the Baptist religious faith and from attempting to undermine the children's religious training received from the custodial mother.
4. Paul Baker's specific request for visitation on Sunday mornings is denied and visitation shall remain as previously ordered.

While we affirm the Trial Court's order, we must respectfully disagree with the rule that the Court applied.

Our review of cases tried without a jury is de novo upon the record with a presumption of correctness as mandated by Rule 13(d) of the Tennessee Rules of Appellate Procedure. This Rule requires us to uphold the factual findings of the Trial Court unless the evidence preponderates against them. Campanali v. Campanali, 695 S.W.2d 193 (Tenn.App.1985). It is with this standard in mind that we undertake our review of the Trial Court's decision.

As already noted, Mr. Baker first raises the issue of whether the General Sessions Court's order was an abuse of that Court's discretion and whether the order violated Mr. Baker's First Amendment and Tennessee Constitutional protections of free exercise of religion. The Freedom of Religion Clause in the First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." The First Amendment also binds the states through the Fourteenth Amendment to the United States Constitution. Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444 (1968). Article I, Section 3 of the Tennessee Constitution provides in part, "That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience . . .; and that no preference shall ever be given, by law, to any religious establishment or mode of worship."

Although individuals possess a Constitutional right to the freedom of religion, these rights can be overbalanced by interests of the highest order by the several states. Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526 (1972). The protection of its children is of the utmost importance to states. In visitation cases, the welfare and best interests of the child are the paramount considerations. Luke v. Luke, 651 S.W.2d 219 (Tenn.1983). Additionally, courts must also balance the rights of the parents whenever making decisions that will affect the parent/child relationship. However, when the parents remain at odds regarding the children's religious upbringing, the best interests of the child may require some limitations on the rights

of either or both of the parents. Neely v. Neely, 737 S.W.2d 539 (Tenn.App.1987).

In cases involving religious disputes between divorced parents, courts must maintain strict neutrality. Neely, supra. This neutrality reflects the importance of both parents' religious beliefs. The law tolerates and even encourages, to a point, divorced parents to expose their children to their religious influences, even if divided in their faiths. Neely, supra; Felton v. Felton, 418 N.E.2d 606 (Mass.1981). Therefore, a court shall not prefer one parent's religion over another unless the children's health and well being are threatened by one of the parent's religious practices and beliefs. Neely, supra.

The majority of courts decline to interfere in religious disputes between divorced parents. However, courts can intervene when a non-custodial parent exposes his or her religious beliefs to minor children upon a clear and affirmative showing that these activities and expressions of belief are harmful to the children. Neely, supra; In re Marriage of Murga, 163 Cal.Rptr. 79 (1980); Felton, supra; see LeDoux v. LeDoux, 452 N.W.2d 1 (Neb.1990). The parent that moves to restrict the other parent's right to expose the children to a different religion shall bear the burden of showing clear and affirmative harm.

The harm to the children resulting from exposure to their parents' conflicting religions must be demonstrated in detail and not simply surmised or assumed. Neely, supra; Felton, supra. A court should consider several factors to determine whether the children's welfare has been adversely affected.

Corroborated testimony should be provided as to the children's general demeanor, attitude, health, school work, appetite, or outlook resulting from the alleged religious conflict. Pope v. Pope, 267 S.W.2d 340 (Mo.Ct.App.1954). In support of the alleged harm resulting from the religious conflict, corroborating testimony should be heard from church, school, medical or psychiatric authorities, or any of the children's associates, whether in or out of school. Pope, supra.

Neely is the only Tennessee case that has applied the clear and affirmative harm test. In Neely, the noncustodial father attempted to delete a visitation requirement that the father return his son to his former wife on Sunday morning during his visitation so their child could attend church with the mother. Ms. Neely was an active member of the Baptist religion prior to the divorce and when the above visitation provision was ordered. She regularly took their child to church on Sunday morning and evening. Following the divorce, Mr. Neely began regularly attending a Pentecostal church. Ms. Neely responded to Mr. Neely's petition to delete the above visitation provision on the basis that she wanted to raise her son as a Baptist and that the Pentecostal beliefs, such as "speaking in tongues," would confuse the child. After propounding the proper clear and affirmative harm test, the Neely Court stated that no proof existed in the record that exposing the child to the father's religion would affect the child's mental or physical well-being. The Court held that Ms. Neely's unsubstantiated belief that the child could become confused does not satisfy the clear and affirmative harm test and struck the visitation provision.

Although Neely correctly states the applicable test, the case is otherwise unpersuasive for the present case. In Neely, the mother only provided unsubstantiated claims that the child would be confused if exposed to the father's religion. In the present case, two expert reports, one from a psychologist and the other from a licensed clinical social worker, were presented as well as the testimony of several individuals, family, friends, a psychologist, and clergy, regarding the resulting affects from the children's exposure to Mr. Baker's religion. The Trial Court held that the conflict between the parents affected the children. Although the Court held that the testimony conflicted somewhat, it nonetheless reached the conclusion that the children were affected by the conflict resulting from exposure to Mr. Baker's religion. The Court based its holding on facts such as Amanda's stomach problems, changes in the children's attitudes, and difficulties in disciplining the children. These facts are sufficient to support a clear and affirmative showing that the conflict resulting from exposure to Mr. Baker's religion is harmful to the children. We decline to require that the children of this state be harmed more than in the present case to satisfy the clear and affirmative harm standard.

Upon a clear and affirmative finding of harm, a court can issue an order that limits the rights of parents to expose the minor children to their religious beliefs and practices. Courts should devise visitation orders, to the extent possible, that interferes with the parent/child relationship as little as possible. In re Marriage of Mentry, 190 Cal.Rptr. 843 (1983). The Trial Court prohibited Mr. Baker from taking the children to any Jehovah's Witness religious services or home Bible studies.

However, we find that this order adequately protects the children while still allowing Mr. Baker the opportunity to introduce the children to his religion if the children show an interest. The provision allowing Mr. Baker to discuss his religion upon legitimate inquiries sufficiently protects Mr. Baker's freedom of religion under both the United States and Tennessee Constitutions.

As also already noted, Mr. Tillett, an elder in the Jehovah's Witness religion, testified that the children did not have to be converted to the Jehovah's Witness religion for Mr. Baker to attain salvation. Therefore, Mr. Baker can fully practice his religion in a manner to attain salvation to the extent that he does so outside the presence of the children, unless the children make legitimate inquiries about the religion. The Trial Court's order only slightly impinges Mr. Baker's freedom to practice his religion under the United States and the Tennessee Constitutions. This limitation is more than substantially supported by the state's utmost interest in protecting children.

While the Trial Court ordered Mr. Baker not to expose the minor children to the Jehovah's Witness religion, unless the children make legitimate inquiries, the Court did not specify the religion, if any, to which the children may be exposed. The Court only ordered that "[Ms.] Baker has the primary right to determine the religious faith the children are exposed to, influenced by, and educated with." By refusing to prefer a specific religion over another, the Trial Court successfully evaded an entanglement between church and state.

For the foregoing reasons, we hold the Trial Court's order was not an abuse of discretion nor did it violate Mr. Baker's First Amendment and Tennessee Constitutional protections of free exercise of religion.

We now turn to Mr. Baker's second issue on appeal: whether the Trial Court's order violated the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb. This issue is moot, as counsel for Mr. Baker conceded at oral argument, since the United States Supreme Court held that the Act exceeded Congress' enforcement powers under § 5 of the Fourteenth Amendment to the United States Constitution. City of Boerne v. Flores, \_\_\_ U.S. \_\_\_, 117 S.Ct. 2157 (1997).

Finally, we address the issue of whether the portion of the Trial Court's order prohibiting Mr. Baker from exposing the children to the Jehovah's Witness' doctrine and limiting his discussion thereof with them constitutes error, an abuse of discretion, and a violation of the children's First Amendment rights. We begin by noting that in crafting visitation orders, the Trial Court shall not specifically order the children to follow a specific religion. Mollish v. Mollish, an unreported opinion of this Court, filed in Knoxville on October 24, 1994. The children should retain the right to attend any services if they choose to do so upon their own volition.

We note that Mr. Baker raises this issue for the first time on appeal. He never sought the appointment of a guardian for the children nor introduced testimony that the children

opposed the teachings of the Baptist faith. Nor have the children asserted that their constitutional rights have been violated by their mother's stance in this case.

The Trial Court does not mandate that the children be raised in the Baptist faith. Neither does the Court's order prevent the children from converting to the Jehovah's Witness faith if they so choose. The Court crafted its order only to remove the conflict in question and its resulting injury to the children. In fact, the Court wisely and specifically allows Mr. Baker the opportunity to share his religion with his children if they so inquire.

We hold that the Trial Court properly crafted its visitation order. Ms. Baker can determine the minor children's religious training without violating their constitutional rights. However, children sometimes choose to follow a different religion than their parents. They must have the freedom to follow their religion of choice if different from either of their parents' religion. The Trial Court's order properly allows the children freedom to make religious decisions based upon their personal conscience while protecting the children from their parents' religious conflicts.

Allowing the children the right to ask about their father's religion properly protects the children's First Amendment constitutional rights. The Trial Court's order properly protects the children from the religious dispute between the parents while allowing the children to make religious determinations for themselves.

Therefore, we affirm the Trial Court's post-divorce visitation modification order and remand the case for such further proceedings, if any, as may be necessary and collection of costs below. Costs of appeal are adjudged against Mr. Baker and his surety.

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Houston M Goddard, P.J.

CONCUR:

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Herschel P. Franks, J.

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William H. Inman, Sr. J.